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In The

Supreme Court of the United States

October Term, 1982

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN, in her own right,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury on strict liability and negligence in a crashworthiness product liability case.

2. Whether the trial court abused its discretion in excluding unreliable hearsay testimony.

PARTIES

The caption to the case contains the names of all parties to the proceedings in the Court of Appeals for the Third Circuit whose judgment is sought to be reviewed.

In response to United States Supreme Court Rule 28.1, Ford Motor Company states that it has no parent company. Its less than wholly-owned subsidiaries and affiliates are listed in the Appendix, *supra*.

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No.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This product liability action arises out of an incident that occurred on September 10, 1977. Petitioner Edward Olsen was a passenger in a 1972 Ford Pinto driven by Timothy Cooper. Also in the vehicle were Kurt J. Hassenstein and Dwight E. Keslov.

At about 4:00 a.m. Cooper swerved to avoid a small animal and lost control of the vehicle. The vehicle rolled over 1½ times, coming to rest on its roof. After the accident, Mr. Olsen was found unconscious and seriously injured outside of the vehicle.

Petitioners never claimed that any defect in the vehicle, or any negligence on the part of Ford Motor Company, caused Mr. Cooper to lose control of the vehicle, or caused the vehicle to begin to roll over. Rather, the petitioners' theory was that Ford was negligent, and the vehicle was defective, because it was not "crashworthy." Specifically, petitioners claimed the vehicle was defective and uncrashworthy in two respects. First, petitioners claimed the roof support structure was not strong enough. Second, petitioners claimed that two spot welds in the right A pillar (the post between the passenger side door window and the windshield) failed during the rollover. As a result of one or both of these defects, petitioners claimed, the roof of the vehicle deformed and crushed Mr. Olsen's head between the roof and the passenger seat. Respondent Ford Motor Company denied the vehicle was defective in any respect, and further contended that Mr. Olsen's injuries occurred when he was ejected from the vehicle.

The case was tried in the United States District Court for the Eastern District of Pennsylvania. The basis for federal jurisdiction was diversity of citizenship. After a ten-day trial, during which petitioners' crashworthiness theories were fully explored, the case was submitted to the jury on theories of strict liability and negligence. The jury returned a verdict in favor of Ford.

Petitioners' post-trial motions were denied by the trial judge in a comprehensive written opinion, which is attached to the petitioners' petition for writ of certiorari and reported at 521 F. Supp. 59. The United States Court of Appeals for the Third Circuit affirmed, substantially for the reasons given by the trial judge

in his opinion. Petitioners' petition for rehearing was denied, and their petition to this Court followed.

SUMMARY OF ARGUMENT

No substantial federal questions are raised by the petitioners' petition. The manner in which "crashworthiness" principles are explained to the jury is clearly a question of state law, and the trial court properly exercised its discretion in excluding unreliable hearsay testimony.

REASONS FOR DENYING THE WRIT

I.

The trial court fairly submitted petitioners' crashworthiness claims to the jury. That the trial judge used different words than those desired by petitioners' attorney does not raise a federal question.

It is true, as petitioners contend, that most courts have held that a manufacturer has a duty to design and manufacture a "crashworthy" vehicle, and that the manufacturer cannot escape liability simply because it was not responsible for causing the accident itself. Petitioners contend in their petition that the trial court and the Court of Appeals abandoned this "crashworthiness doctrine",* thus creating a "conflict with every other United States

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* Petitioners' petition uses the term "crashworthiness" and "second collision." The two terms are generally used interchangeably. *See generally,* Hoenig, *Resolution of "Crashworthiness" Design Claims,* 55 St. John's L. Rev. 633 n.1, 634 n.2 (1981). The term "second collision" usually refers to the impact between a passenger and an interior part of the vehicle following the initial impact. *Id.*

Court of Appeals which has considered the question." This is nonsense. The entire case revolved around crashworthiness principles. As the trial judge observed in his opinion, "Neither the parties nor, consequently, the court, presented the case to the jury in a way suggesting the manufacturer could escape liability if the defect or negligence did not cause the accident itself." On the contrary, the trial judge specifically instructed the jury that petitioners *could* recover if their crashworthiness claims were established by the evidence:

> "If you find a defect in either or both of those elements, the roof or the welds, and you further conclude that they were a proximate cause of his injury, he is entitled to recover from Ford Motor Company for any injuries so caused."

Thus, the "conflict" which petitioners attempt to create simply does not exist. The duty to design and manufacture a crashworthy vehicle has never been disputed in this case.

Petitioners' real complaint apparently concerns the words chosen by the trial court to explain crashworthiness standards to the jury. The trial judge's reasons for instructing the jury as he did are fully explained in his opinion, which is attached to the petitioners' petition. For now, it is sufficient to note that petitioners' argument that national uniformity is required in crashworthiness cases is little more than a thinly disguised request for this Court to promulgate standard jury instructions for use nationally. The inappropriateness of this request in a diversity case is obvious.

II.

The trial court properly exercised its discretion in excluding unreliable hearsay testimony.

Petitioners' second point concerns the exclusion of hearsay testimony from Marshal Roger F. Holley. Trial courts, of course, are vested with wide discretion in the admission or exclusion of evidence. There is nothing in the record of this case to suggest abuse of that discretion, and certainly nothing that would warrant this Court's attention.

Marshal Holley arrived at the scene of the accident 10 minutes after he received a call from the sheriff's department. There is no evidence concerning how long after the fact the sheriff's department was informed of the accident. In any event, shortly after Marshal Holley arrived on the scene, someone told him that "the one that was hurt seriously was pulled from the car." Petitioners offered this portion of Marshal Holley's deposition as evidence that Mr. Olsen was not ejected from the car as Ford claimed.

Marshal Holley's vague testimony concerning what was said to him by some unidentified person was properly excluded by the court. First, the petitioners' failed to establish any foundation for their claim that this hearsay testimony was admissible under Federal Rule of Evidence 803(2). To be admissible as an excited utterance under that Rule, the statement must be made while the declarant was under the stress of excitement caused by the event or condition. *United States v. McLennon,* 563 F. 2d 943 (9th Cir. 1977); *United States v. Narciso,* 446 F. Supp. 252 (E.D. Mich. 1977). There is no evidence that the unidentified declarant who spoke to Marshal Holley was under the stress of excitement.

Moreover, Marshal Holley's deposition testimony lacked any semblance of reliability. It was undisputed at trial that two persons were seriously injured in the accident, Mr. Olsen and Mr. Keslov. Keslov *was* pulled from the vehicle by Hassenstein. Thus, the statement made to Marshal Holley could have referred equally well to the fact that Hassenstein pulled Keslov from the vehicle. The most reliable testimony on the issue was that of Cooper and Hassenstein, both of whom testified that they did not remove Olsen from the vehicle. The reliability of hearsay testimony which vaguely (if at all) suggests the contrary is clearly suspect.

None of the cases cited by the petitioners involved considerations even remotely similar to these. The exclusion of Marshal Holley's testimony under the circumstances involved in this case was clearly well within the trial judge's discretion.

CONCLUSION

The petitioners in this case are asking this Court to promulgate national standards for resolving product liability crashworthiness claims, and to secondguess the sound exercise of the trial judge's discretion on an evidentiary matter. The petition for writ of certiorari should be denied.

Respectfully submitted,

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PETER SAMSON

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Attorneys for Respondent

APPENDIX

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1).

The principal affiliates and subsidiaries (other than wholly owned subsidiaries) of Ford Motor Company are as follows:

Ford Motor Company (Belgium) N.V.;
Ford Motor Company of Canada Ltd.;
Ford Motor Company A/S (Denmark);
O Y Ford A D (Finland);
Ford-Werke Aktiengesellschaft (Germany);
Ford Nederland N.V. (Holland);
Hokkai Ford Tractor Co. Ltd. (Japan);
Ford Motor Company Sktiebolag (Sweden);
Ford Lio Ho Motor Company Ltd. (Taiwan);
Ford Glass Limited (Canada);
Ford Motor Company of Malaysia SDN. BHD.

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth in the following list. The list was accurate as of October 31, 1982, and is the most current listing available:

Banner Ford, Inc.	Decatur, Ga.
Bob Beard Ford	Augusta, Ga.
Coastal Ford	Mobile, Al.
Deland Ford/Merc.	Deland, Fl.
Family Ford Sales	Spartanburg, S.C.
Freeway Ford	Columbus, Ga.
Heritage Ford/LM	Cookeville, Tenn.
Billy Howell Ford	Cumming, Ga.
Rick Hunt Ford	Warrenton, Va.

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King's Colonial Ford	Brunswick, Ga.
King's Crown Ford	Jacksonville, Fl.
Bo Lovein Ford	Nashville, Ga.
Lynchburg Ford	Lynchburg, Va.
Miracle Ford	Gallatin, Tenn.
Marshall Mize Ford	Chattanooga, Tenn.
Mountain View Ford	Chattanooga, Tenn.
Nelson Ford	DeFuniak Springs, Fl.
Old South Ford	Lexington, N.C.
Ed Sherling Ford	Enterprise, Al.
Spalding Ford/LM	Griffin, Ga.
Springfield Ford/LM	Springfield, Tenn.
Wayne Blackwood LM	Rome, Ga.
Sam Johnson LM	Charlotte, N.C.
Riverside LM	Madison, Tenn.
Rowan LM	Winter Haven, Fl.
Southern LM	Decatur, Ga.
Atlantic Ford-Merc	Saco, Me.
Chemung Ford	Elmira, N.Y.
Hammonasset Ford/LM	Madison, Ct.
Roger Karns Ford	Oneonta, N.Y.
Stan Martin Ford	Hudson, N.Y.
Metro Ford Sales	Schenectady, N.Y.
Millinocket Ford-Merc	Millinocket, Me.
Roberts Motor Sales	Attleboro, Ma.
Shiretown Ford	Plymouth, Ma.
Bob Thomas Ford	Hamden, Ct.
Bay State LM	Framingham, Ma.
Merrimack LM	Methuen, Ma.
Norman LM	Westbrook, Me.
Pride LM	Lynn, Ma.
Sentry LM	Medford, Ma.
Springfield LM	Springfield, Ma.

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Atchley Ford	Omaha, Ne.
Ben-Hur Ford Sales	Sioux Falls, S.D.
Borchers Ford/LM	Rhinelander, Wi.
Century Ford Sales	Arlington Hts., Il.
Don Courtney FM	Sandwish, Il.
Family Ford Sales	West Chicago, Il.
Fox Valley Ford	Aurora, Il.
Dee Harrison Ford	Manmouth, Il.
Highland Park Ford	Highland Park, Il.
Karp's Ford Sales	Houghton, Mi.
Al Piemonte Ford Sales	Melrose Park, Il.
Rock River Ford	Rockford, Il.
Romeo Ford	Romeville, Il.
Southgate Ford	Milwaukee, Wi.
Suburban Ford, Inc.	Elgin, Il.
Toten-Evert Ford/LM	Marquette, Mi.
Willowbrook Ford	Willowbrook, Il.
Barrington Sales	Barrington, Il.
Bell LM Sales	Highland Park, Il.
Berens LM	Chicago, Il.
Capitol LM	Chicago Hts., Il.
Joe Carini LM Sales	Saukesha, Wi.
Libertyville LM	Libertyville, Il.
Lombard LM	Lombard, Il.
River Oaks LM	Calumet City, Il.
Carriage Ford	Clarksville, In.
Country Ford	Belle Vernon, Pa.
Fuller Ford	Cincinnati, Oh.
Hundley Ford	Providence, Ky.
Interstate Ford	Miamisburg, Oh.
Landmark Ford Sales	Hamilton, Oh.
Bill McCoy Ford	Muncie, In.
Parkview Ford	Middletown, Oh.

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Parkway Ford	Madisonville, Ky.
Ramsey-Sturman Ford	Pittsburgh, Pa.
Dick Ruhl Ford Sales	Columbus, Oh.
Shoemaker-Finch Ford	Springfield, Oh.
Target Ford	Monroeville, Pa.
Ernest White Ford	Delaware, Oh.
Whitewater Ford/LM	Connersville, In.
Woltz & Wind	Heidelberg, Pa.
Astley LM	Chillicothe, Oh.
Columbia LM	Indianapolis, In.
Jim Dixon LM	Fairfield, Oh.
Fort Wayne, LM	Fort Wayne, In.
Metropolitan LM	Louisville, Ky.
North LM	Indianapolis, In.
Taylor Sales	Cincinnati, Oh.
Blue Springs Ford	Blue Springs, Mo.
Champion Motor Sales	Dallas, Tx.
Indian Springs Ford	Kansas City, Ks.
Interstate Ford Sales	St. Joseph, Mo.
Middlekauff Ford	Dallas, Tx.
North Central Sales	Richardson, Tx.
One Moore Ford	No. Little Rock, Ar.
Ron Roberts Ford	Wichita Falls, Tx.
Gus Shaffar Ford	Joplin, Mo.
Starkville Ford/Merc.	Starkville, Ms.
Stuard Ford	Ferriday, La.
Vantage Ford/LM	ElDorado, Ks.
Westway Motor Sales	Irving, Tx.
Bob Higgins LM	Texas City, Tx.
North Hills LM	Hurst, Tx.
Northtowne LM	Kansas City, Mo.
Adrian Ford/LM	Adrian, Mi.
All American Ford	Saginaw, Mi.
Alpena Ford/LM	Alpena, Mi.

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Battle Creek Ford	Battle Creek, Mi.
Al Bennett Ford	Flint, Mi.
Dock Boyd Ford	Ludington, Mi.
Candy Ford/Merc	Charlotte, Mi.
Mel Farr Ford	Oak Park, Mi.
Friendly Ford	Monroe, Mi.
Greenville Ford/LM	Greenville, Mi.
Tom Holzer Ford	Farmington, Mi.
Montrose Ford	Akron, Oh.
Niles Ford/LM	Niles, Mi.
Renaissance Ford	Detroit, Mi.
Tom Sheridan Ford	Bryan, Oh.
University Ford	Bowling Green, Oh.
Varsity Ford	Ann Arbor, Mi.
Village Ford	Dearborn, Mi.
Lima LM	Lima, Oh.
Stadium LM	Youngstown, Oh.
Avalon Ford	Carson, Ca.
Mel Burns Ford	Long Beach, Ca.
Chino Hills Ford	Chino, Ca.
Frank Coletto Ford	Harbor City, Ca.
Allen Kane Ford	No. Hollywood, Ca.
Keystone Ford	Norwalk, Ca.
Pacific Ford	Long Beach, Ca.
Tate Ford/LM	Holbrook, Az.
Beverly Hills LM	Beverly Hills, Ca.
Covey LM Sales	Phoenix, Az.
Santa Barbara LM	Santa Barbara, Ca.
Hassett LM	Wantagh, N.Y.
Knight LM	Wynnewood, Pa.
Lawrence LM	Trenton, N.J.
New Rochelle LM	New Rochelle, N.Y.
North Star LM	Poughkeepsie, N.Y.

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Sheehy LM	Springfield, Pa.
Bee Ford	Waterbury, Ct.
Best Ford, Inc.	Queens Village, N.Y.
Bridge Ford	Brooklyn, N.Y.
Dan Buckey Ford	Spring Valley, N.Y.
C & C Motors	Horsham, Pa.
Century Ford	Rockville, Md.
Champion Ford	Baltimore, Md.
Bob Doran Ford	Union, N.J.
Empire Ford	Mt. Vernon, N.Y.
Family Ford	Netcong, N.J.
Gateway Ford	Ozone Park, N.Y.
Hopkins Ford	Jenkintown, Pa.
Kuhns-Harnish Ford	Mechanicsburg, Pa.
Manhattan Ford/LM	New York, N.Y.
Manor Ford	E. Northport, N.Y.
Marple Ford	Broomall, Pa.
McCafferty Ford Sales	Langhorne, Pa.
Popular Ford	Brooklyn, N.Y.
Poughkeepsie Ford	Poughkeepsie, N.Y.
Bill Toynes Ford	Haverstraw, N.Y.
Tower Ford	Baltimore, Md.
Tristate Ford	Elkton, Md.
White Plains Ford	White Plains, N.Y.
Big Valley Ford	Stockton, Ca.
Fitzgerald Ford	Gig Harbor, Wa.
Fremont Ford Sales	Fremont, Ca.
Heritage Ford	Modesto, Ca.
Hilltop Ford Sales	Richmond, Ca.
Jim Houston Ford	Seattle, Wa.
Kingsrow Ford/LM	Hanford, Ca.
Pittsburg Ford	Pittsburg, Ca.
San Bruno Ford	San Bruno, Ca.

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Seekins Ford/LM	Fairbanks, Ak.
Central LM	Eugene, Or.
Diablo LM	Concord, Ca.
Mission LM	Layward, Ca.
San Francisco LM	San Francisco, Ca.
Shen LM	Burlingame, Ca.
Spokane LM	Spokane, Wa.
Bartow Ford Leasing	Bartow, Fl.
Action Leasing & Rental	Jackson, Ms.
Don Ford Leasing	Biloxi, Ms.
Keller Leasing & Rental	Grand Rapids, Mi.
North Bros. Ford Leasing	Troy, Mi.
Turner-Flannery Leasing	Troy, Mi.
Peyton Cramer Leasing	Redondo Beach, Ca.
Miller McVeigh Leasing	State College, Pa.
Northeast Leasing	Washington, D.C.
Illinois Auto Leasing	Libertyville, Il.
Terry's Leasing	Orland Park, Il.
American Auto Lease	Framingham, Ma.
Bob Boyd Leasing	Columbus, Oh.
Dayton Auto Lease	Kettering, Oh.
Kumfco Auto Lease	Denver, Co.
Monarch Leasing	Sunnyvale, Ca.
Redwood LM Leasing	San Francisco, Ca.

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